



SDR:DH  
90-7-1-21

US EPA RECORDS CENTER REGION 5



515753

Washington, D.C. 20530

December 6, 1982

Edward J. Schwartzbauer, Esquire  
Dorsey & Whitney  
2200 First Bank Place East  
Minneapolis, Minnesota 55402

Dear Ed:

Re: United States v. Reilly Tar & Chemical Corp.,  
Civil No. 4-80-469

I am concerned by your November 22, 1982 letter. As you know, both the United States and the State of Minnesota have been very forthcoming in providing your client with raw data concerning the St. Louis Park situation. My recent request that you send us a written list of the questions which ERT wished to ask Marc Hult was not intended as a ploy to delay the preparation of a settlement proposal. Rather, I had asked for a written list of ERT's questions because of Marc Hult's concern that some of the questions which ERT had asked him orally seemed not to be requests for raw data, but inquiries into his interpretative work, which has been undertaken in his role as an expert witness.

I had asked that ERT put its questions in writing as an initial effort to create a channel so that your client can have ready access to the raw data without taking undue advantage of Mr. Hult's dual role as an employee of a public agency and as an expert witness. I must emphasize that while USGS, as a public institution, and Mr. Hult, as one of its employees, have provided information concerning the site, the interpretative work undertaken by Mr. Hult for the purposes of this litigation, such as modelling, has been treated as trial preparation. Although we are fully prepared to make raw data available to your client, we believe that we are entitled to prevent communications among experts from becoming a vehicle for the one-sided discovery of the interpretative analysis performed by our expert witnesses.

Rather than close down all communication while attempting to hammer out an effective channel for your requests for data, I had proposed at that time that you send me written questions which Mr. Hult would answer in writing. My statement that your request that Mr. Hult speak directly with ERT came at an "awkward time" referred to the fact that one may not always be able to arrange effective guidelines for such communications as quickly as one might wish. I had hoped that you would bear with me while I attempted to work out the problem.

Since the date of your letter, I informed you that we had reviewed the list of questions which you had provided and that, because the list included only requests for raw data or for information relating to USGS work done elsewhere than St. Louis Park, we agreed to allow ERT representatives to talk with Mr. Hult about the items on the list. I believe that in future we can speed responses to you of ERT's questions if you will provide me with a written list of the areas of questioning before hand. In many instances, as in this one, conversations with Mr. Hult about items on the list may be speedily authorized. Both Steve Shakman and I would prefer that Mike Hansel participate in the conversations between Mr. Hult and ERT. Also, as I said on the phone, we will expect Reilly Tar to pay for any significant expenditure of Mr. Hult's time to provide ERT with raw data.

I do not agree, as your letter seems to suggest, that our efforts to work out appropriate channels for providing ERT with raw data somehow unduly delay finding a final remedy for the St. Louis Park situation. The United States and the State of Minnesota have been willing in several specific instances, notably the August 24 meeting and the milestone meetings, to permit an interchange of ideas among technical experts representing various parties, without lawyers present. In these specific instances, we believed that those technical experts who had administrative responsibility for organizing remedial activities, particularly Mike Hansel and Paul Bitter, the technical coordinators, might usefully exchange ideas with their ERT

counterparts about remedial approaches. Mr. Hult, however, was not present at the August 24 meeting and has a very different role from Mr. Hansel and Mr. Bitter.

No party, including Reilly Tar, has agreed to the "free communication among experts." I am sure that there are experts at work on behalf of Reilly Tar to help it prepare its case, with whom we and our experts have not had communications.<sup>\*/</sup> Such practice is, of course, wholly consistent with the Federal Rules of Civil Procedure. Thus, by permitting certain communications under controlled circumstances with Marc Hult, we have been unusually forthcoming, rather than obstructionist.

With respect to the December 31 presentation date for Reilly's settlement proposal, as I mentioned to you on the telephone, we do not regard that date as anything but a deadline which Reilly Tar has imposed on itself; we will be receptive to any serious settlement proposal at any time Reilly Tar is prepared to present one. Moreover, we do not begrudge Reilly Tar the raw data necessary to prepare such a proposal.

Sincerely,

Assistant Attorney General  
Land and Natural Resources Division

By: *David Hird*  
David Hird  
Attorney, Environmental Enforcement  
Section

cc: Erica Dolgin, Esquire  
Stephen Shakman, Esquire  
Dennis Coyne, Esquire  
Wayne Popham, Esquire  
Allen Hinderacker, Esquire  
Robert Leininger, Esquire  
Mr. Michael Hansel  
Mr. Marc Hult  
Mr. Paul Bitter

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<sup>\*/</sup> Indeed, my understanding has been that those Reilly Tar experts who have been in communication with us -- Fran McMichael, John Craun and Bill Gregg -- are not intended to be called as witnesses at trial. Please correct me if I am wrong.